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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

ERNESTO PEDRO LOPEZ,

Defendant and Appellant.

A144064

(San Mateo County
Super. Ct. No. SC080512A)

Appellant Ernesto Pedro Lopez and two companions were involved in a three-on-one bar fight in which the victim was punched and hit with a brick. Appellant was placed on felony probation after a jury convicted him of assault with a deadly weapon and assault by means of force likely to cause great bodily injury, accompanied by a finding that his personal use of a dangerous or deadly weapon rendered the former offense a serious felony. (Pen. Code, §§ 245, subd. (a)(1) & (4), 1192.7, subd. (c)(23).)¹ He raises no issue concerning his convictions, but argues the trial court abused its discretion by ordering him to pay direct victim restitution in an amount that included the value of the victim's diminished paid sick leave. We affirm.

“[I]n every case in which a victim has suffered economic loss as a result of the defendant's conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court.” (§ 1202.4, subd. (f).)

¹ Further statutory references are to the Penal Code.

Restitution must “ ‘be set in an amount which will fully reimburse the victim for his or her losses unless there are clear and compelling reasons not to do so. . . .’ ” (*People v. Mearns* (2002) 97 Cal.App.4th 493, 499.) “ ‘When there is a factual and rational basis for the amount of restitution ordered by the trial court, no abuse of discretion will be found by the reviewing court.’ ” (*Ibid.*)

As a result of the injuries suffered, and as confirmed by doctor’s notes, the victim in this case was unable to work during the three months following the attack and required a surgery that left him unable to work for an additional three weeks. The victim calculated he had used 525 hours of paid sick leave for a total loss of \$19,372.50 during his three-month absence, and would use an additional 134 hours of paid sick leave for a total loss of \$4,944.60 during the time away from work following the surgery. The trial court ordered appellant to pay \$25,180.48 in direct victim restitution as a condition of probation, which included \$24,317.10 for the amount of sick leave used. This obligation was made joint and several with similar restitution orders against appellant’s two cohorts in the attack, who had each pleaded no contest to a single count of assault by means of force likely to cause great bodily injury and had been placed on probation.

The court did not abuse its discretion in formulating the restitution order. As appellant acknowledges, a crime victim is entitled to recover direct restitution for economic losses suffered as a result of the defendant’s conduct, including “[w]ages or profits lost due to injury incurred by the victim” (§ 1202.4, subd. (f)(3)(D).) In *In re K.F.* (2009) 173 Cal.App.4th 655, 666 (*K.F.*), the court recognized the use of paid sick leave as a compensable economic loss under this provision: “The evidence was sufficient to show that the victim continued to be paid by his employer only by depleting his sick leave. This depletion represented a loss to him—the credits consumed would not be available to cover future illnesses or for whatever other beneficial purpose the employer might allow.”

Appellant does not dispute *K.F.*’s holding that lost accrued sick leave can be an item of loss for which restitution is appropriate, but argues that an award is speculative unless the victim establishes that the depletion of sick leave will ripen into an actual

financial loss to the victim, for example, if the victim is left with insufficient sick leave to be paid during a subsequent illness and absence from work. We are not persuaded.

“While its precise economic value might be uncertain, the court in making a restitution order is not required to determine the ‘exact amount of loss,’ so long as it employs ‘a rational method that could reasonably be said to make the victim whole,’ and is not ‘arbitrary and capricious.’ [Citation.] The sick leave used by the victim was a valuable right which he lost as a direct result of appellant’s conduct. Given that the exact value of that loss was dependent to some extent on unknown variables, including unknowable future contingencies, the trial court did not act irrationally in simply allowing the value of the time it represented.” (*K.F., supra*, 173 Cal.App.4th at p. 666.)

As the Attorney General points out, paid sick leave “can be viewed as a form of employer-provided pay insurance.” A restitution award will not be reduced based on the fortuity that a crime victim has had the foresight to purchase insurance that covers a loss caused by the crime; by a parity of reasoning, the fortuity of a victim’s employment with an organization that offers paid sick leave should not reduce the defendant’s obligation to compensate the victim for time taken off work to recover from injuries suffered. (See *People v. Birkett* (1999) 21 Cal.4th 226, 246.) Had the victim in this case worked for an employer that did not offer paid sick leave, he would have been entitled to recover lost wages for the time he could not work. Appellant should not receive a windfall simply because the victim was effectively reimbursed by his employer. (*Ibid.*)

The judgment is affirmed.

NEEDHAM, J.

We concur.

JONES, P.J.

BRUINIERS, J.